(8)

No. 109, Original

FILED
JAN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S REPLY ON MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

HAL STRATTON
Attorney General of New Mexico

HENRY M. BOHNHOFF
Deputy Attorney General

CHRISTOPHER D. COPPIN
Assistant Attorney General

PETER THOMAS WHITE*
ERIC RICHARD BIGGS
Special Assistant Attorneys General

New Mexico Interstate
Stream Commission
Bataan Memorial Building, Room 101
Santa Fe, New Mexico 87503
(505) 827-6150

Attorneys For New Mexico

* *Counsel of Record*

R. VERGARA PRINTING COMPANY · SANTA FE, NEW MEXICO

No. 109, Original

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S REPLY ON MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

New Mexico replies to plaintiffs' response to New Mexico's Motion for Leave to File Supplemental Answer. Plaintiffs' response is based on an incomplete and misleading characterization of the initial pleadings and other proceedings in this case. This reply corrects and clarifies the record concerning preliminary proceedings and otherwise replies to plaintiffs' arguments. To do so, this reply will refer to informal conferences held before the Special Master, although the parties were not bound by discussions in those meetings. *See, e.g.*, Tr. at 15 (Feb. 26, 1988).

Immediately upon learning at a pre-trial conference before the Special Master that plaintiffs construed their Complaint so broadly as to provide for such drastic remedies as alteration of dam structures in New Mexico to reduce storage capacities, New Mexico raised the need to amend its Answer to include an additional affirmative defense of laches. Tr. at 71-72, 78, 111, 113 (Feb. 26, 1988). Until then, New Mexico had not reasonably been put on notice of plaintiffs' intent. *See id.* at 78. New Mexico had reasonably inferred from the Complaint that, notwithstanding the plaintiffs' allegations concerning excess reservoir capacity, an order from the Court requiring New Mexico to enforce existing or modified operating criteria for Ute Dam in compliance with the Canadian River Compact would have been sufficient to satisfy plaintiffs' original prayer for relief. Plaintiffs later requested leave to file a Supplemental Complaint with the Court, raising certain allegations of which they had become aware, and to which New Mexico intended to respond. Motion for Leave to File Supplemental Complaint and Supplemental Complaint, Nov. 18, 1988; *see* Tr. at 25-26 (Aug. 23, 1988); Tr. at 89-91 (Nov. 3, 1988). Plaintiffs' Motion for Leave to File Supplemental Complaint was allowed by the Court on December 12, 1988.

The Supplemental Complaint included specific damage claims and prayers for relief. These new allegations made clear for the first time in formal pleadings that the plaintiffs were seeking something more than a simple Court order instructing New Mexico to refrain from violating the Compact. Accordingly, New Mexico has moved for leave to respond to the allegations in its Supplemental Answer, and has included the laches defense. The Supplemental Answer was New Mexico's first opportunity to plead laches after having been put on notice of the necessity of pleading it. Therefore, the laches defense is timely, and, in any case, plaintiffs have not been prejudiced.

Laches is an affirmative defense under Fed. R. Civ. P. 8(c). Affirmative defenses, though not initially pleaded, are not waived where, despite a technical failure to follow the rule, the matter is raised in the trial court in a manner which does not prejudice the plaintiff. *Allied Chemical Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983); *see Joplin v. Bias*, 631 F.2d 1235, 1237 (5th Cir. 1980).

Finally, even if the Court were to find some merit in plaintiffs' objection to New Mexico's assertion of laches, this Court has counseled in the past that an original action "is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy," in that "[a] State is superior to the forms it may require of its citizens." *Virginia v. West Virginia*, 220 U.S. 1, 27-28 (1911).

CONCLUSION

For all the above reasons, New Mexico's Motion for Leave to File Supplemental Answer should be granted.

HAL STRATTON
Attorney General of New Mexico

HENRY M. BOHNHOFF
Deputy Attorney General

CHRISTOPHER D. COPPIN
Assistant Attorney General

PETER THOMAS WHITE
ERIC RICHARD BIGGS
Special Assistant Attorneys General

New Mexico Interstate
Stream Commission
Bataan Memorial Building, Room 101
Santa Fe, New Mexico 87503
(505) 827-6150

Attorneys For New Mexico

January 25, 1989.